

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD JURRIES,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5048758 and 5048759

AMENDED AND SUBSTITUTED
REVIEW-REOPENING
DECISION

RICHARD JURRIES,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured
Defendant.

File No. 5067793

AMENDED AND SUBSTITUTED
ARBITRATION DECISION

HEADNOTE NOS: 1803, 2403, 2907

Claimant Richard Jurries filed two petitions on July 1, 2014. In File Number 5048758, Jurries alleged he sustained injuries to his neck, back, shoulders, and depression while working for the defendant, Tyson Foods, Inc. ("Tyson"), on December 12, 2012. In File Number 5048759, Jurries alleged he sustained injuries to his neck, back, shoulders, and depression while working for Tyson on March 6, 2013. Tyson filed answers.

An arbitration hearing was held on September 1, 2015. On May 11, 2016, Deputy Workers' Compensation Commissioner James Elliott issued an arbitration decision and later granted two motions for rehearing. Deputy Elliott awarded Jurries a total of 175 weeks of permanent partial disability benefits. In File Number 5048758, Deputy Elliott found Jurries sustained a twenty-five percent industrial loss for his low back condition, and awarded Jurries 125 weeks of permanent partial disability benefits at the weekly rate of \$395.72. In File Number 5048759, Deputy Elliott found Jurries sustained a total industrial disability of thirty-five percent, with an additional ten percent

industrial loss for his neck and provided a credit to Tyson for the benefits paid in File Number 5048758, and awarded Jurries an additional 50 weeks of permanent partial disability benefits at the weekly rate of \$389.25.

On March 4, 2019, Jurries filed review-reopening petitions for File Numbers 5048758 and 5048759, seeking additional compensation benefits. In March 20, 2019, Jurries filed a petition in arbitration, File Number 5067793, alleging he sustained injuries to his neck, back, shoulders, and depression while working for Tyson on January 24, 2013. Tyson filed answers to the petition and review-reopening actions on March 20, 2019.

A hearing on the review-reopening actions and petition was held via CourtCall video conference on November 23, 2020. Attorney Emily Anderson represented Jurries. Jurries appeared and testified. Attorney Jason Wiltfang represented Tyson. Mary Jones was present on behalf of Tyson by telephone conference call, but did not testify. Joint Exhibits ("JE") 1 through 6, Exhibits 1 through 9 and A through K were admitted into the record. At the start of the hearing, the parties submitted three hearing reports, listing stipulations and issues to be decided. Tyson waived all affirmative defenses.

The record was held open through December 23, 2020, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injuries.
2. Jurries sustained an injury to his low back, which arose out of and in the course of his employment with Tyson on December 12, 2012, File Number 5048758.
3. Jurries sustained an injury to his neck, which arose out of and in the course of his employment with Tyson on March 6, 2013, File Number 5048759.
4. Jurries sustained an injury to his neck, which arose out of and in the course of his employment with Tyson on January 24, 2013, File Number 5067793.
5. The alleged injuries were a cause of temporary disabilities during periods of recovery.
6. Temporary benefits are no longer in dispute.
7. The alleged injuries caused permanent disabilities.
8. The disabilities are industrial disabilities.
9. The commencement date for permanent partial disability benefits for File Number 5048758 is January 15, 2014.

10. The commencement date for permanent partial disability benefits for File Numbers 5048759 and 5067793 is June 15, 2017.

11. At the time of the alleged injury for File Number 5048758, Jurries' gross earnings were \$623.05 per week, he was single and entitled to one exemption, and the weekly rate is \$395.72.

12. At the time of the alleged injury for File Numbers 5048759 and 5067793, Jurries' gross earnings were \$611.97 per week, he was single and entitled to one exemption, and the weekly rate is \$389.25.

13. Prior to the hearing for File Number 5048758, Jurries was paid 125 weeks of compensation at the weekly rate of \$395.72 and Tyson is entitled to a total credit of \$49,465.00.

14. Prior to the hearing for File Numbers 5048759 and 5067793, Jurries was paid 121.714 weeks of compensation at the weekly rate of \$389.25 and Tyson is entitled to a total credit of \$47,377.17.

15. Costs have been paid.

16. During the hearing Tyson agreed to pay the cost of the independent medical examination.

ISSUES

1. Has Jurries established he has sustained a change of condition warranting an award of additional workers' compensation benefits?

2. Should costs be assessed against either party?

FINDINGS OF FACT

Jurries lives with his wife in Waterloo. (Transcript, page 16) At the time of the November 2020 hearing, Jurries was fifty-four. (Tr., p. 15)

Jurries graduated from alternative high school and has received no additional education. (2016 Arbitration Decision; Tr., p. 17) Following high school Jurries worked as a car detailer. (2016 Arbitration Decision) Tyson's predecessor, IBP, hired Jurries to work on the pack-off line where he stacked boxes, moved meat combos, and drove a mule. (2016 Arbitration Decision) Jurries left IBP to work for a tree trimming company where he chipped and hauled brush. (2016 Arbitration Decision) Jurries returned to IBP and worked on the loin line driving a mule. (2016 Arbitration Decision) Jurries left IBP and worked for a flooring company. (2016 Arbitration Decision) In 2007, Jurries returned to IBP where he worked in production as a mule driver, in the freezer, and in Manifest Pizza. (2016 Arbitration Decision) IBP is now known as Tyson. Jurries has worked for Tyson for a total of approximately twenty-five years. (Tr., p. 17) Jurries has worked in six positions during his tenure with Tyson. (Tr., p. 17)

On December 12, 2012, Jurries felt a pop in his lower back while lifting a box that fell off a pallet in the freezer. (2016 Arbitration Decision) Jurries reported the work injury to Tyson. Tyson provided treatment to Jurries with Jeff Lee, M.D., and Robert Gordon, M.D., a physician who examines and treats Tyson employees in the plant. (2016 Arbitration Decision) During an appointment on February 5, 2013, Jurries reported his low back pain had improved, but he had developed pain in his upper back between his shoulders. (2016 Arbitration Decision)

Following the December 2012 injury, Tyson accommodated Jurries with light-duty work. (2016 Arbitration Decision) In late February or early March, Tyson placed Jurries on monitor tongues, where he sat and looked up slightly as tongues went into a machine. (2016 Arbitration Decision) After a week on the job Jurries began experiencing symptoms in his neck. (2016 Arbitration Decision) In a March 6, 2013 report of injury, Jurries identified January 24, 2013, as the date he complained of neck and upper extremity pain. (2016 Arbitration Decision) Jurries testified during the arbitration hearing he felt neck symptoms at the time of his December 2012 injury. (2016 Arbitration Decision)

In March 2013, Jurries attended an appointment with Dr. Gordon complaining of left trapezius region pain and pain and numbness down his left upper extremity. (2016 Arbitration Decision) Jurries told Dr. Gordon he believed his symptoms developed from sitting in a chair all day and looking up to watch product go by. (2016 Arbitration Decision) Dr. Gordon listed an impression of a lumbosacral strain, found Jurries had reached maximum medical improvement, and assigned a zero percent impairment rating without referencing a particular version of the AMA Guides. (2016 Arbitration Decision) Dr. Gordon listed an impression of "likely left cervical radiculopathy," noting Jurries had similar symptoms in 2011 following a work injury, which improved with anti-inflammatory medication, imposed a fifteen pound lifting restriction, and recommended physical therapy. (2016 Arbitration Decision)

During an appointment with Dr. Lee on March 26, 2013, Jurries reported his back pain had been going on for some time, his pain had resolved for a period, but it had returned, and he was experiencing mid spine pain and cervical spine pain with radicular symptoms going down into his finger. (2016 Arbitration Decision)

Dr. Gordon referred Jurries to Chad Abernathey, M.D., for a cervical spine evaluation. (2016 Arbitration Decision) Dr. Abernathey diagnosed Jurries with a C6-C7 disc extrusion with osteophyte formation and stenosis, recommended conservative care first, and if conservative care did not work, surgery. (2016 Arbitration Decision) Prior to the October 2015 hearing, Dr. Abernathey offered Jurries surgery, which Jurries declined, opting for conservative care. (2016 Arbitration Decision)

In May 2013, Jurries began treating with a pain specialist, Frank Hawkins, M.D. (2016 Arbitration Decision) Dr. Hawkins listed an impression of cervicalgia,

degenerative cervical disk disease, and resolving cervical radiculopathy and administered a cervical epidural steroid injection. (2016 Arbitration Decision)

In a response to an inquiry from Tyson, Dr. Gordon opined he could not state within a reasonable degree of medical certainty that Jurries' current left cervical symptoms were caused by the March 6, 2013 work activity, agreed the work activity did not aggravate Jurries' cervical condition, and agreed Jurries' cervical condition could be caused by preexisting factors. (2016 Arbitration Decision)

Dr. Abernathey also reported he was unable to state to a reasonable degree of medical certainty whether Jurries' cervical condition was caused by the March 6, 2013 work activities, that preexisting factors could have caused the condition, and he could not opine if the condition was permanent. (2016 Arbitration Decision)

Dr. Hawkins performed additional injections and a nerve ablation on Jurries' lumbar spine. (2016 Arbitration Decision) The nerve ablation only helped for a short period and Dr. Hawkins stated he did not believe additional radio frequency ablation would be helpful. (2016 Arbitration Decision) Dr. Hawkins advised Jurries to speak with Tyson about obtaining a job that did not involve twisting. (2016 Arbitration Decision)

During an appointment on November 19, 2013, Dr. Gordon noted Jurries was not working because Tyson limits light-duty work to 270 days. (2016 Arbitration Decision) Dr. Gordon recommended a trial of chiropractic care, and imposed restrictions of no lifting over twenty-five to thirty pounds and no bending over sixty-six percent of the day, and recommended Jurries consider bidding into a different job with lower lifting requirements than his current position in the freezer. (2016 Arbitration Decision) Deputy Elliott found Dr. Gordon's recommendation to bid into a position with a lower lifting requirement to be a physician-recommended restriction as a result of the December 2012 or March 2013 work injuries. (2016 Arbitration Decision)

Jurries bid on a Manifest Pizza job, which he received in November 2013. (2016 Arbitration Decision) The job required Jurries to inventory pizza and required some lifting. (2016 Arbitration Decision) While Jurries did not receive any formal accommodations for the position, Tyson allowed him take breaks and to limit the time he drove a mule. (2016 Arbitration Decision) Deputy Elliott found Tyson provided Jurries with accommodations for the position. (2016 Arbitration Decision)

On January 14, 2014, Jurries attended an appointment with Dr. Gordon complaining of lumbar pain. (2016 Arbitration Decision) Dr. Gordon noted Jurries had experienced an exacerbation of his lumbar condition caused by coughing, found Jurries had reached maximum medical improvement, released him to full duty, assigned a zero percent impairment rating without referencing a particular version of the AMA Guides, and recommended Jurries receive additional chiropractic care. (2016 Arbitration Decision)

On April 24, 2014, Dr. Abernathey responded to an inquiry from Tyson, agreeing Jurries sustained a work injury on June 27, 2011, which resulted in neck pain and left-sided radicular symptoms, Jurries received treatment, and he was released to full duty on August 18, 2011. (2016 Arbitration Decision) Dr. Abernathey agreed based on Jurries' history, records, and imaging, and his examination, Jurries materially aggravated his underlying conditions as a result of his work activities in March 2013. (2016 Arbitration Decision) On May 21, 2014, Dr. Abernathey changed his opinion in response to an inquiry from Tyson, agreeing Jurries' March 2013 work duties did not materially aggravate his underlying neck condition or materially light up his neck condition, and that any care for his neck would not be due to an injury at Tyson. (2016 Arbitration Decision)

Stanley Mathew, M.D., performed an independent medical examination for Jurries on October 6, 2014. (2016 Arbitration Decision) Dr. Mathew listed an impression of chronic neck pain, cervical radiculopathy, mid back pain, myofascial pain, chronic low back pain, and lumbosacral radiculopathy. (2016 Arbitration Decision) Dr. Mathew opined Jurries' injuries to his low back were consistent with the December 2012 injury. (2016 Arbitration Decision) Dr. Mathew found Jurries reinjured and aggravated his preexisting neck condition on March 6, 2013. (2016 Arbitration Decision) Dr. Mathew assigned Jurries a combined thirty percent whole person impairment rating, recommended permanent restrictions of avoiding lifting over fifteen pounds, prolonged standing, walking, and sitting, and to avoid ladders, squatting, and twisting of the cervical region. (2016 Arbitration Decision) Dr. Mathew recommended Jurries be referred to a pain specialist to manage his pain, medication, physical therapy, and injections. (2016 Arbitration Decision)

On February 5, 2015, Dr. Gordon responded to questions posed by Tyson, stating he disagreed with Dr. Mathew's opinion, he did not believe Jurries' back symptoms were work-related and he did not believe Dr. Mathew's recommendations Jurries receive pain management, medication, and physical therapy were related to any work injury at Tyson. (2016 Arbitration Decision) Dr. Gordon stated his referral for chiropractic care was for overall body conditioning and not for the injury process. (2016 Arbitration Decision)

Deputy Elliott found Dr. Mathew's opinion to be most convincing on causation and permanency and adopted Dr. Mathew's restrictions as Jurries' permanent restrictions. (2016 Arbitration Decision) Deputy Elliott found the December 2012 injury permanently injured Jurries' low back. (2016 Arbitration Decision) Deputy Elliott found the second injury occurred on January 24, 2013, and not on March 6, 2013, as noted in the exhibits and reports, and determined the injury permanently aggravated and lit up Jurries' preexisting cervical condition. (2016 Arbitration Decision) Deputy Elliott found Jurries sustained a twenty-five percent industrial loss from his low back condition, awarded Jurries 125 weeks of permanent partial disability benefits, and found Jurries sustained an additional ten percent industrial loss for his neck condition, for a total

industrial disability of thirty-five percent, and after applying a credit for the first injury, awarded Jurries an additional fifty weeks of permanent partial disability benefits.

After the original hearing, Jurries continued to receive treatment. Jurries filed review-reopening actions for File Numbers 5048758 and 5048759, and a new petition for File Number 5067793. File Numbers 5048759 and 5067793 refer to the same injury. Deputy Elliott found the injury occurred on January 24, 2013, noting the parties and witnesses had referred to a March 6, 2013 injury. Jurries filed the new petition, File Number 5067793, to reflect the injury date found by Deputy Elliott in the May 2016 decision. During the review-reopening hearing, the parties entered into a stipulation that all benefits paid for the cervical injury were paid on both dates of injury, January 24, 2013 and March 6, 2013. (Tr., pp. 5-6)

On August 2, 2016, Dr. Gordon examined Jurries for the first time since January 1, 2014. (JE 1, p. 1) Jurries reported his neck bothered him at times when performing general cleaning activities with a broom in the Manifest Pizza position. (JE 1, p. 1) Jurries complained of intermittent neck, mid back, and lower back pain mostly near the end of the work week, and denied any radiation of numbness or tingling into his upper or lower extremities or weakness in his upper and lower extremities. (JE 1, p. 2) Dr. Gordon found Jurries had subjective complaints of cervical, thoracic, and lumbosacral pain without objective examination abnormalities, recommended a home exercise program for general wellness with no further treatment, and imposed no permanent work restrictions. (JE 1, p. 3)

On August 26, 2016, Jurries attended an appointment with Julie Sandell, D.O., reporting he was having trouble getting out of bed due to his depression and that he had chronic back pain caused by and exacerbated by his work, noting his back pain was "about the same" or "worse" than it was before." (JE 2, pp. 21-22) Jurries relayed the pain was bilateral, across his entire low back, and the radiation depended on the position, but the right side was the worse. (JE 2, p. 22)

Jurries returned to Dr. Sandell on September 27, 2016, complaining of neck and mid back pain, noting his neck was stiff and he had a headache, and reporting, if he turned his neck just right, he would experience pain down his left arm, and sometimes the pain would continue, causing his arm to become weak. (JE 2, pp. 26-27) Jurries reported the last time he had experienced these symptoms was two years ago. (JE 2, p. 27) Dr. Sandell noted Jurries' low back pain had been addressed during his prior visit and was not revisited. (JE 2, p. 27) Dr. Sandell assessed Jurries with neck pain, chronic midline thoracic back pain, bulging cervical intervertebral disc, and cervical myelopathy with cervical radiculopathy. (JE 2, p. 27) Dr. Sandell ordered cervical spine x-rays and magnetic resonance imaging, and noted Jurries had been referred to Dr. Abernathey. (JE 2, p. 27)

Jurries underwent cervical spine magnetic resonance imaging on September 29, 2016. (JE 2, pp. 30, 32) The reviewing radiologist listed an impression of multilevel

degenerative changes, noting at C5-C6 Jurries had uncovertebral joint space hypertrophy and facet arthrosis on the right contributing to mild right foraminal narrowing with no cord compression or left foraminal narrowing, at C6-C7 he had a broad based disc bulge with mild ventral cord flattening and moderate to severe foraminal narrowing bilaterally, and at C7-T1 no cord compression, with uncovertebral joint space hypertrophy on the right contributing to moderate right foraminal narrowing. (JE 2, pp. 30, 32)

On October 3, 2016, Jurries returned to Dr. Abernathey complaining of persistent neck and low back pain with left upper extremity paresthesia. (JE 3, p. 39) Dr. Abernathey noted Jurries underwent new cervical spine magnetic resonance imaging, which demonstrated modest degenerative changes at multiple levels and he continued to have a large left C6-C7 disc extrusion with osteophyte formation and stenosis. (JE 3, p. 39) Dr. Abernathey discussed conservative management versus surgical intervention. (JE 3, p. 40)

On December 14, 2016, Dr. Abernathey performed a C6-C7 anterior cervical discectomy, osteophylectomy, and instrumented allograft fusion on Jurries. (JE 3, p. 41) Dr. Abernathey listed postoperative diagnoses of left C7 radiculopathy and left C6-C7 disc extrusion with osteophyte formation and stenosis. (JE 3, p. 41) Following surgery Dr. Abernathey restricted Jurries from working. (JE 3, p. 42) During an appointment on December 28, 2016, Dr. Abernathey documented Jurries had received excellent relief from his pre-operative symptomatology and prescribed physical therapy. (JE 3, p. 42) Dr. Abernathey later provided Jurries with permission to return to work following his February 7, 2017, appointment with Dr. Gordon, and noted Jurries had reported a lumbosacral strain, which Dr. Gordon was going to evaluate. (JE 3, p. 43)

Jurries attended sixteen physical therapy appointments following surgery. (JE 4, p. 47) During a session on February 6, 2017, Jurries reported his pain had continued to decrease, but he continued to have soreness, he had headaches a couple of time per week, and cervical extension was the only activity or movement that "brings on" his left upper extremity symptoms. (JE 4, pp. 48-49) The physical therapist noted Jurries' progression toward functional lifting had caused flare ups of his neck and back symptoms. (JE 4, p. 49)

On February 7, 2017, Jurries returned to Dr. Gordon, complaining of thoracic and lumbosacral region pain and reporting he had been off work since his surgery. (JE 1, p. 4) Dr. Gordon listed an impression of cervical pain, status post anterior cervical discectomy and fusion at C6-C7, thoracic pain, and lumbosacral pain, recommended thoracic, lumbar, and sacral magnetic resonance imaging, and released Jurries to return to his Manifest Pizza job without restrictions. (JE 1, p. 5)

On February 10, 2017, Jurries received magnetic resonance imaging. (JE 5, pp. 52-53) When reviewing the sacrum/coccyx imaging, the reviewing radiologist found mild degenerative disc disease at L5-S1 and concluded the imaging was normal. (JE 5,

p. 52) When reviewing the thoracic spine imaging, the reviewing radiologist listed an impression of a disc bulge with paracentral disc protrusion small in size, T2-T3 small central disc protrusion with minimal encroachment of the ventral thecal sac with no cord compression at T1-T2, and evidence of a moderate size disc herniation with compression of the lateral recess on the right as well as the anterior surface of the cord on the right at T6-T7. (JE 5, p. 53) When reviewing the lumbar spine imaging, the reviewing radiologist noted the imaging appeared similar to the exam on November 4, 2013. (JE 5, p. 54) The reviewing radiologist listed an impression of multilevel disc protrusions at L1-L2, L3-L4, and L5-S1, a disc bulge extending into the right L5-S1 neural foramina with evidence of compression of the exiting right L5 nerve root, with the patient reporting symptoms on the left. (JE 5, p. 54)

Jurries attended a follow-up appointment with Dr. Gordon on February 21, 2017. (JE 1, p. 6) Dr. Gordon noted the reviewing radiologist found Jurries had a disc bulge with paracentral disc protrusion that was small at T1-T2, a small central disc protrusion with minimal encroachment of the ventral thecal sac at T2-T3, and a moderate-sized disc herniation with compression of the lateral recess of the right, as well as anterior surface of the cord on the right, at T6-T7. (JE 1, p. 6) Dr. Gordon noted the reviewing radiologist found his lumbar spine imaging to be similar to imaging from November 3, 2013, noting multi-level disc protrusions at L1-L2, L3-L4, L4-L5, and L5-S1, with a disc bulge extending into the right L5-S1 neuroforamina with evidence of compression of the exiting right L5 nerve root, and no abnormalities of the sacrum/coccyx. (JE 1, p. 6) Jurries relayed his thoracic and lumbar regions felt better, but he had not been working, noted he did not have any symptoms down his right lower extremity, and reported he had some waxing and waning pain in his left lower extremity. (JE 1, p. 7) Dr. Gordon recommended Jurries be referred to Dr. Abernathy regarding his thoracic and lumbar spine complaints, and noted he would need clarification as to what job Jurries would be going back to and access the job demands. (JE 1, p. 7)

On March 27, 2017, Jurries returned to Dr. Abernathy complaining of low back pain and reported he received reasonable results for epidural steroid injections administered by Dr. Hawkins three years before. (JE 3, p. 43) Dr. Abernathy noted Jurries' thoracic spine, lumbosacral spine, and sacrum/coccyx magnetic resonance imaging was "unrevealing demonstrating only minimal degenerative changes," he did not recommend an aggressive neurosurgical stance, and Jurries might benefit from treatment with Dr. Hawkins. (JE 3, p. 43)

Jurries attended an appointment with Dr. Hawkins on April 20, 2017, complaining of back pain and occasional left leg pain for four or five months, which he believed was due to repetitive lifting. (JE 6, p. 57) Dr. Hawkins noted he had not treated Jurries since 2013. (JE 6, p. 57) Jurries described the pain as an aching and tingling sensation that is there most of the time and affects his ability to sleep and work. (JE 6, p. 57) Jurries reported coughing, standing, walking, lifting, twisting, and bending forward seemed to make the pain worse and rest and medication were the only things

that seemed to help. (JE 6, p. 57) Jurries relayed he had popping, catching, and weakness in his low back and occasional pain radiating down his left leg. (JE 6, p. 57) Dr. Hawkins listed an impression of low back pain, degenerative lumbar disc disease with intermittent left lumbar radiculopathy, lumbar spondylosis without radiculopathy, cervicgia, and status post anterior cervical discectomy and fusion. (JE 6, p. 58) Dr. Hawkins recommended and performed an epidural steroid injection, and recommended Jurries continue his exercises for core strengthening. (JE 6, pp. 58-59)

On May 10, 2017, Jurries attended a follow-up appointment with Dr. Abernathey at the request of Dr. Gordon. (JE 3, p. 43) Jurries reported he developed neck pain and an intermittent left upper extremity paresthesia approximately two weeks ago. (JE 3, p. 43) Dr. Abernathey noted Jurries had returned to work in February 2017 for two days before he developed low back pain, Dr. Gordon had examined him and released him to return to work, and now he had developed neck pain. (JE 3, p. 43) Dr. Abernathey recommended cervical spine magnetic resonance imaging. (JE 3, p. 43)

After receiving the imaging, Jurries returned to Dr. Abernathey on May 22, 2017. (JE 3, p. 43) Dr. Abernathey documented the imaging demonstrated excellent improvement over the previous imaging with resolution of the disc protrusion with "definite improvement" according to the radiologist. (JE 3, p. 43) Dr. Abernathey recommended conservative treatment, noted the majority of Jurries' pain extends into his left pectoralis muscle, and opined Jurries might benefit from an epidural steroid injection and pain clinic evaluation. (JE 3, p. 43)

On June 5, 2017, Jurries returned to Dr. Hawkins, for a reevaluation after Dr. Abernathey had found he had reached maximum medical improvement. (JE 6, p. 60) Jurries relayed he was experiencing pain that radiates down his left arm and left hand, but the pain was not new and existed before surgery. (JE 6, p. 60) Dr. Hawkins listed an impression of cervicgia, degenerative cervical disc disease, left anterior chest wall pain, etiology undetermined, status post anterior cervical discectomy and fusion at C6-C7, and right T1-T2 paracentral disc protrusion. (JE 6, p. 61) Dr. Hawkins documented he told Jurries he could not correlate his magnetic resonance imaging findings with his complaints and discussed that the disc issue at T1-T2 should give him right-sided complaints and not left-sided complaints. (JE 6, p. 61) Dr. Hawkins offered and administered an epidural steroid injection to Jurries. (JE 6, p. 61)

On June 14, 2017, in response to a letter from Tyson, Dr. Abernathey opined Jurries reached maximum medical improvement for his March 6, 2013 injury on June 14, 2017. (Exs. G, p. 1; 4, p. 34) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Abernathey assigned Jurries a nine percent whole body impairment rating. (Exs. G, p. 1; 4, p. 34) Dr. Abernathey imposed no restrictions and recommended no additional treatment. (Exs. G, pp. 1-2; 4, pp. 34-35) At the time of the original arbitration hearing Dr. Abernathey assigned Jurries a zero percent impairment rating for his cervical spine condition. (Tr., p. 37)

Jurries underwent a functional capacity evaluation with a physical therapist ordered by Dr. Gordon on June 27, 2017. (Ex. H) The physical therapist found the evaluation to be invalid because Jurries performed inconsistently during a repeated measures protocol and he determined Jurries failed to give maximum voluntary effort during the evaluation. (Ex. H, p. 1)

On July 25, 2017, Jurries returned to Dr. Gordon, reporting he was experiencing some pain in his neck with exertion, denying any weakness or loss of range of motion in his left shoulder, but reporting some left anterior chest wall pain. (JE 1, p. 8) Jurries had received an injection from Dr. Hawkins in his lumbar region and expressed concern he would reinjure his low back. (JE 1, p. 8) Dr. Gordon noted Jurries had undergone a functional capacity evaluation, but the physical therapist concluded the exam was not valid and his effort was inconsistent. (JE 1, p. 9) Dr. Gordon agreed with Dr. Abernathey that Jurries did not need any restrictions for his cervical spine, and found Jurries had reached maximum medical improvement for his thoracic pain and lumbosacral pain, discharged Jurries without any permanent restrictions, but “empirically place[d] him on restrictions of no lifting over 50 pounds due to his personal concerns for reinjury as opposed to true objective findings” with respect to his lumbar spine, and discharged Jurries from care. (JE 1, p. 9)

At the time of the original arbitration hearing Jurries was working in Manifest Pizza. (Tr., pp. 17-18) Dr. Gordon had not recommended any lifting restrictions at that time. (Tr., p. 37) After Dr. Gordon imposed the 50 pound lifting restriction, Jurries was not capable of performing the Manifest Pizza job and he had to go on a bid walk. (Tr., pp. 22, 37-38) When an employee is not physically capable of performing a job due to permanent restrictions, the employee loses his or her job and cannot work until the employee finds a job that meets the employee’s restrictions. (Tr., p. 19) The process of finding a new job within the restrictions is called a “bid walk.” (Tr., p. 19)

On August 3, 2017, Dr. Gordon responded to a check-the-box letter after reviewing job analyses and digital presentations for positions, and checked he believed Jurries could perform the cold scale operator, remove tender membrane (strip tenders, and separate stomach positions. (JE 1, p. 10) Jurries could not perform the tender membrane job because he had previously undergone trigger finger release surgery. (Tr., p. 40) Jurries tried the cold scale job for two or three days. (Tr., p. 41) The job required Jurries to look up, which hurt his neck. (Tr., pp. 41, 65-66) Jurries relayed that he had an issue with looking up dating back to the 2015 hearing, which was one of the issues he had with the monitor tongues job. (Tr., p. 66) Tyson did not offer Jurries the separate stomachs job, which requires the employee to stand on a production line for three hours before taking a break. (Tr., pp. 41-42) Jurries reported he did not believe he could stand for three hours because of his low back condition, noting he can stand for approximately one hour at a time. (Tr., pp. 42-43)

On September 7, 2017, Tyson offered Jurries a position doing load-out product protection. (Tr., p. 45) The position required Jurries to drive and walk part of the time to

check whether the reefer trailers had fuel, to check the temperature of the trailers outside the plant, and to use a computer. (Tr., p. 45) Jurries testified he had a difficult time concentrating and learning the new job. (Tr., p. 46) Tyson disqualified Jurries from the position on December 9, 2017. (Tr., p. 47) After Tyson disqualified Jurries from the load-out production protection position, Jurries went on another bid walk. (Tr., pp. 47-48)

On November 30, 2017, Jurries attended an appointment with Dr. Hawkins. (JE 6, p. 62) Jurries relayed the L4-L5 translaminar epidural steroid injection he received in April 2017 provided relief until about three months ago and reported he was getting along reasonably well. (JE 6, p. 62) Jurries complained of back pain predominantly on the right side. (JE 6, p. 62) Dr. Hawkins listed an impression of low back pain, multilevel degenerative lumbar disc disease, worse at L4-L5 and L5-S1, lumbar spondylosis without radiculopathy, cervicgia, status post anterior cervical discectomy and fusion, degenerative cervical disc disease, and degenerative thoracic disc disease. (JE 6, p. 63) Dr. Hawkins documented he told Jurries he could not completely define whether his symptoms were coming from his facets or his disc disease and discussed and performed an epidural steroid injection. (JE 6, p. 62)

Jurries did not secure another position with Tyson until February 2018, when he started working as a maintenance janitor. (Tr., pp. 47-48; Ex. 8, pp. 69-70) The position requires Jurries to clean the rest rooms, locker room, dust, and take out the trash, and the ability to lift forty pounds. (Tr., p. 48) At the time of the November 2020 hearing Jurries was working as a janitor for Tyson. (Tr., p. 18) Tyson allows him to take a break to sit at least once per hour and he can move around the plant. (Tr., p. 43)

Since the pandemic Jurries has to sanitize the tables in the cafeteria. (Tr., p. 49) Jurries reported the tables are low, which aggravates his lower back and neck. (Tr., p. 49) A garbage sack may weigh fifty pounds or more. (Tr., p. 55) Tyson has informed Jurries that if a sack is too heavy he can take objects out or ask for help. (Tr., p. 55)

On May 23, 2018, Dr. Mathew, a physiatrist, conducted an independent medical examination for Jurries. (Ex. 2, p. 24) Dr. Mathew reviewed Jurries' medical records and examined him, noting he had not examined Jurries since 2014. (Ex. 2, pp. 24, 26) Dr. Mathew listed an impression of cervical radiculopathy, postlaminectomy syndrome, chronic neck pain, cervical dystonia, chronic low back pain, lumbosacral radiculopathy, and enthesopathy of the cervical and lumbar spine. (Ex. 2, p. 26) Dr. Mathew noted since his surgery in 2016, Jurries' physical condition had become progressively worse, noting he had increasing weakness, his pain had progressed, and his cervical spine and lumbar spine range of motion had worsened. (Ex. 2, p. 26) Dr. Mathew opined Jurries had sustained a change of condition related to his initial injuries that occurred on December 12, 2012 and March 6, 2013. (Ex. 2, p. 26) Using the AMA Guides, Dr. Mathew opined:

... using table 15-5, I would place a 20% whole person impairment rating in regards to injuries suffered to Mr. Jurries' cervical spine and resulting in a cervical spine fusion multilevel as well as his cervical dystonia that he has developed.

I would place a 7% whole person impairment rating in regards to his thoracic spine due to intractable and worsening pain using table 15-4 of the AMA guides 5th edition.

Using table 15-3 I would place a 12% whole person impairment rating in regards to his chronic low back pain and LS radiculopathy.

In total I would place a 38% whole person impairment rating in regards to injuries that occurred on December 12, 2012 and additionally on March 6, 2013.

(Ex. 2, p. 27) Dr. Mathew recommended personal restrictions of avoiding lifting over fifteen pounds, prolonged standing, walking, and sitting, avoiding squatting, ladders, and heights. (Ex. 2, p. 27) Dr. Mathew recommended follow-up care with a chronic pain specialist, physical therapy, aquatic therapy, and chronic pain management, including medical, psychology, and injection therapy. (Ex. 2, p. 27)

On June 26, 2018, Jurries completed a form for Tyson noting he aggravated his medical condition at home on June 23, 2018, when leaning over to use a weed eater at home. (JE 1, p. 13) At that time Jurries was working as a janitor at Tyson. (JE 1, p. 13) On June 28, 2018, Tyson sent a letter to Dr. Gordon asking a series of questions. (JE 1, p. 14) Dr. Gordon wrote Jurries lumbar pain was "not related" to the March 6, 2013 work injury and that the injury occurred while performing yard work at home. (JE 1, p. 14; F, p. 1)

On July 10, 2018, Dr. Gordon examined Jurries. (JE 1, p. 15; F, p. 2) Jurries reported he felt a pulling sensation in his lower back and aching sensation in his left anterolateral thigh region when using a weed whacker two weeks ago, noting he had performed weed whacking in the past without any problem. (JE 1, p. 15) Dr. Gordon listed an impression of lumbosacral strain while performing weed whacking at home, which was not related to the workplace, noted he was doing well, released Jurries to return to work, and discharged Jurries from care. (JE 1, p. 16; F, p. 2) Jurries did not receive any additional treatment from Tyson following the weed whacking incident. (Tr., pp. 25-26) He went to his chiropractor, who he sees every couple of months. (Tr., p. 26) Jurries testified he did not sustain a new injury when he was weed whacking, and relayed he aggravated his low back injury, and his pain and symptoms returned to what they had been after the incident. (Tr., pp. 24-25)

On October 23, 2018, Jurries returned to Dr. Gordon reporting pain in his left trapezial/pectoralis region/left upper arm region. (JE 1, p. 17) Jurries relayed the symptoms were similar to symptoms he had in the past. (JE 1, p. 17) Dr. Gordon

recommended cervical spine magnetic resonance imaging and released Jurries to full duty. (JE 1, p. 18)

Jurries underwent cervical spine magnetic resonance imaging on October 26, 2018. (JE 5, p. 55) The reviewing radiologist listed an impression of an anterior fusion at C6-C7, disc protrusion at T1-T2 paracentral to the right, unchanged, disc bulge at T2-T3 without significant change since prior exam, stable imaging of the cervical spine when compared to the prior exam, degenerative disc disease, and small nodes jugular chain bilaterally most likely reactive without significant swelling. (JE 5, p. 56)

After receiving the imaging, Jurries returned to Dr. Gordon on November 6, 2018. (JE 1, p. 19) Dr. Gordon noted the reviewing radiologist had found "[a]nterior fusion at C6-C7; disc protrusion at T1-T2 paracentral to the right, unchanged; disc bulge at T2-T3 without significant change since prior exam; stable MRI of the cervical spine when compared with prior exam; degenerative disc disease; small nodes jugular chain bilaterally most likely reactive without significant swelling." (JE 1, p. 19) Dr. Gordon recommended a referral to pain management to determine if an epidural steroid injection would be appropriate and released Jurries to full duty. (JE 1, p. 19)

Jurries returned to Dr. Hawkins on November 15, 2018, complaining in the past few weeks he had developed new increased discomfort in his neck that radiates toward his left shoulder down to the left part of his chest. (JE 6, p. 64) Dr. Hawkins listed an impression of cervicalgia, multilevel degenerative cervical disc disease, status post anterior cervical discectomy and fusion, intermittent left cervical radiculopathy, bilateral C6-C7 neural foraminal stenosis, and low back pain. (JE 6, p. 64) Dr. Hawkins offered and administered an epidural steroid injection. (JE 6, p. 65)

On November 27, 2018, Jurries attended an appointment with Dr. Gordon after undergoing a cervical epidural steroid injection at C6-C7. (JE 1, p. 20) Jurries reported the injection helped and he was no longer experiencing symptoms in his left pectoralis region/left upper arm, but reported experiencing a periodic aching sensation of his trapezius/rhomboid regions bilaterally. (JE 1, p. 20) Dr. Gordon found Jurries was doing well, released him from care, and found he could perform the full duties of his janitorial job. (JE 1, p. 20)

On December 19, 2018, Jurries attended an annual physical examination with Sarojini Velamasetti, M.D. (JE 2, p. 34) Jurries complained of back pain between his shoulder blades that started six years ago, noting he received an epidural steroid injection and had a neck fusion with good relief for five years, and since the last year he had been experiencing pain between his shoulder blades and over his neck. (JE 2, p. 34) Jurries also reported he had been feeling depressed, he was having problems concentrating while reading the newspaper and watching television, and with restlessness. (JE 2, p. 34) Dr. Velamasetti assessed Jurries with neck pain, diarrhea, anxiety and depression, hypertension, acquired hypothyroidism, and infective chronic otitis externa of the left ear. (JE 2, p. 36)

On February 10, 2020, Jurries requested additional treatment from Tyson. (Ex. 6, p. 61) Jurries reported on February 7, 2020, he was dusting the top of lockers and felt stiffness and tingling in his fingers and stiffness in his neck and pain in his shoulder blades. (Ex. 6, p. 61)

On February 26, 2020, Jurries attended an evaluation with Dr. Gordon, complaining of neck/shoulder blade stiffness and, at times, numbness and tingling in his upper extremities and low back tightness over the past few weeks. (JE 1, p. 20B) Dr. Gordon inquired about the cause of his symptoms and Jurries told Dr. Gordon he believed his symptoms could be from using a light dusting tool to dust the top of the lockers that requires him to reach above shoulder level. (JE 1, p. 20B) With respect to his low back pain, Jurries relayed he has to bend over at the waist periodically to perform his job duties. (JE 1, p. 20B) Dr. Gordon found Jurries did not have any functional limitations, discharged him from care, and released him to fully duty as a janitor without restrictions. (JE 1, p. 20B)

On February 11, 2020, Dr. Mathew reevaluated Jurries after reviewing additional medical records, including records where Jurries complained of low back pain after using a weed whacker at home in June 2018. (Ex. 2, pp. 28-29) Dr. Mathew noted Dr. Gordon had placed Jurries on a lifting restriction of fifty pounds on October 24, 2017. (Ex. 2, p. 29) Jurries continued to complain of neck pain radiating into his left arm, localized mid back pain, and low back pain that occasionally radiates down his legs, and that his depression and anxiety had worsened. (Ex. 2, p. 29) Jurries was taking Tylenol and Duloxetine for pain control. (Ex. 2, p. 29) Dr. Mathew noted Jurries could ambulate functional distances independently and he continued to have an antalgic gait. (Ex. 2, p. 29) Dr. Mathew listed an impression of cervical pain syndrome, cervical radiculopathy, post laminectomy syndrome, chronic neck pain, cervical dystonia, chronic low back pain, lumbosacral radiculopathy, and enthesopathy of the cervical, thoracic, and lumbar spine. (Ex. 2, p. 30) Dr. Mathew reported his opinions were consistent with his May 2018 report and that Jurries had a change in his physical condition from when he previously examined him in 2018, which he attributed to the December 2012 and March 2013 work injuries. (Ex. 2, p. 30)

Dr. Mathew noted he believed Jurries has sustained a progression in his overall condition, chronic pain, and diagnoses and he continues to have neck pain radiating into his left arm with limited mobility of his cervical spine and worsening chronic pain-related depression. (Ex. 2, p. 30) Jurries relayed to Dr. Mathew he had significant pain in all three areas of his spine, but his neck troubles him the most. (Ex. 2, p. 30) Dr. Mathew did not assign Jurries an additional permanent impairment rating under the AMA Guides, did not recommend any change in work restrictions, and opined Jurries would benefit from continued pain management and medication management injection therapy. (Ex. 2, p. 30)

With respect to the June 2018 weed whacking incident, Dr. Mathew opined he respected Dr. Gordon's opinion, but it was his opinion that Jurries' low back pain was

not related to the June 2018 weed whacking incident, which may have caused an exacerbation of pain, noting Jurries had consistently complained of low back pain since Dr. Mathew performed his initial evaluation in 2014. (Ex. 2, p. 30)

At the time of the November 2020 hearing Jurries reported he had seen his chiropractor every couple of months, he uses heat and ice, and he takes Tylenol for his neck and low back pain. (Tr. Pp. 26-27)

Jurries testified the surgery Dr. Abernathey performed relieved the nerve pain he described as numbness going down his left arm into two of his fingers, but the pain in his neck continued. (Tr., p. 31) Jurries testified the nerve pain continues into his arms and fingers and feels like an electric shock. (Tr., pp. 32-33) Jurries acknowledged he experienced numbness and tingling in his arms during the 2015 hearing and that the symptoms remain the same. (Tr., p. 61) Jurries reported his neck is stiff all the time and he can barely move it. (Tr., pp. 31-32) Jurries relayed he requested treatment from Tyson in 2020 after dusting the locker rooms and reported looking up and dusting with his arms above his head caused problems in his neck and upper extremities. (Tr., p. 34)

Jurries also testified since his surgery he is capable of carrying more weight than he could before his surgery. (Tr., p. 59) At home he is capable of carrying heavier loads of laundry. (Tr., pp. 59-60)

At the time of the original arbitration hearing Jurries was working between thirty-two and forty hours per week, and in 2018 he was working between forty and forty-eight hours per week. (Tr., pp. 63-64) As of the November 2020 hearing, Jurries was working at least forty hours per week. (Tr., p. 64)

Jurries is a member of the union at Tyson and he receives regular raises on a schedule with the other employees. (Tr., pp. 18, 58) At the time of the November 2020 hearing he was earning \$17.00 per hour and at the time of the original arbitration hearing he was earning \$15.25 or \$15.65 per hour. (Tr., p.58) Of the six jobs Jurries has tried, the janitorial job is the only one he is physically able to perform. (Tr., p. 50) Jurries has not tried to bid on any other jobs since he started the janitor job and plans to stay in that position. (Tr., pp. 66-67)

During the original arbitration hearing Jurries testified he had a lot of stiffness in his neck. (Tr., p. 64) Jurries testified his stiffness is the same, but the range of motion in his neck is worse. (Tr., p. 65) Jurries reported his neck pain does not come and go, but his lower back has better days. (Tr., p. 65) No additional surgery has been recommended at this time. (Tr., p. 65)

CONCLUSIONS OF LAW

I. Review-Reopening

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry “shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded.” Iowa Code § 86.14(2). The deputy workers’ compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers’ compensation commissioner must determine “the condition of the employee, which is found to exist subsequent to the date of the award being reviewed.” Id. (Quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers’ compensation commissioner should not reevaluate the claimant’s level of physical impairment or earning capacity “if all of the facts and circumstances were known or knowable at the time of the original action.” Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, “subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*” Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

In the original arbitration decision in May 2016, Deputy Elliott found Jurries sustained a twenty-five percent industrial disability from the December 2012 injury to his low back and a ten percent industrial disability from the January 2013 injury to his neck. Dr. Mathew opined Jurries sustained a combined thirty percent permanent partial impairment caused by the work injury to his back and aggravation of his neck condition and assigned restrictions. Drs. Gordon and Abernathey did not assign Jurries a permanent impairment rating or restrictions. Deputy Elliott found Dr. Mathew’s opinion to be most persuasive and adopted his restrictions.

Jurries contends he is entitled to additional compensation benefits because he has sustained a change of condition. Tyson alleges Jurries has failed to establish a change of physical or economic condition. Tyson contends Jurries’ complaints are the same as at the time of the original arbitration hearing and that the surgery he received improved his functioning. While the evidence establishes Jurries’ wages have increased at Tyson and he has not sustained a change of economic condition, the record evidence supports Jurries has sustained a change of physical condition.

During the hearing I assessed Jurries’ credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he had made inconsistent statements, his “appearance, conduct, memory and knowledge of the facts,” and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Jurries has an obvious interest in the outcome of this case. I had the opportunity to observe Jurries testify under oath. During his testimony he engaged in direct eye contact, his rate of speech was appropriate, and he did not engage in any furtive movements. Jurries’ memory was clear and consistent. I find Jurries’ testimony

reasonable and consistent with the other evidence I believe. Based on my personal observations at hearing, I found Jurries to be a credible witness.

Dr. Abernathey offered Jurries surgery before the October 2015 arbitration hearing. Jurries testified his neck and mid back symptoms have increased since the original arbitration hearing. During the original arbitration proceeding, Drs. Gordon and Abernathey did not assign Jurries a permanent impairment rating for his neck, thoracic spine, or lumbar spine. As discussed above, Deputy Elliott rejected their opinions, and found Dr. Mathew's opinion assigning a combined thirty percent impairment rating most persuasive.

Following the hearing Jurries underwent surgery with Dr. Abernathey. After failing a functional capacity evaluation, Drs. Gordon and Abernathey assigned no permanent work restrictions. In June 2017, Dr. Abernathey assigned Jurries a nine percent impairment rating for his cervical spine, which Tyson accepted. Dr. Mathew opined Jurries had sustained a change of physical condition. Tyson avers Jurries has not sustained a change of condition because his function has increased in his neck. Dr. Abernathey's opinion does not support Tyson's assertion. Before the October 2015 hearing, Dr. Abernathey assigned no impairment rating to Jurries. Following surgery, he assigned a nine percent permanent impairment rating. Moreover, while Jurries' function changed initially, the record supports Jurries' pain, stiffness, and tingling returned and he received a number of injections from Dr. Hawkins after a period of more than three years.

Jurries testified he is able to carry heavier things since the original arbitration after his neck surgery, including a heavier basket of laundry. This testimony supports my finding he is credible. Jurries acknowledged he can carry heavier items. However, during physical therapy, after surgery, Jurries complained of soreness and headaches, noting cervical extension would "bring on" his left upper extremity symptoms. (JE 4, pp. 48-49)

During a May 10, 2017 appointment, Jurries complained to Dr. Abernathey he had developed neck pain and an intermittent left upper extremity paresthesia approximately two weeks before the appointment. (JE 3, p. 43) Dr. Abernathey ordered additional imaging, which he found demonstrated an excellent improvement over the prior imaging, noted the majority of Jurries' pain extended into his left pectoralis muscle, recommending referral for a pain clinic evaluation and a possible epidural steroid injection. (JE 3, p. 43) Jurries returned to Dr. Hawkins reporting he was experiencing pain that radiates down his left arm and left hand, but the pain was not new and existed before surgery. (JE 6, p. 60) While Dr. Hawkins documented he could not correlate Jurries' complaints with his magnetic resonance imaging, he offered and performed an epidural steroid injection. (JE 6, p. 61) This injection was done in a new area of the spine Dr. Hawkins had not previously treated. Based on the foregoing, I find Jurries has established a change of physical condition with respect to his cervical spine condition.

I also find Jurries has sustained a change of condition with respect to his lumbar spine. Jurries complained about his low back pain following his cervical spine surgery and returned to Dr. Hawkins in April 2017, for the first time since 2013, complaining of back pain and occasional leg pain, popping, catching, and weakness in his low back with occasional pain radiating down his left leg, and he received an epidural steroid injection. (JE 6, pp. 57-59)

In July 2017, Dr. Gordon found Jurries had reached maximum medical improvement for his cervical, thoracic, and lumbosacral conditions and discharged him without any permanent restrictions, but then assigned a fifty pound permanent restriction for Jurries' lumbar spine. (JE 1, p. 9) Based on the restriction, Tyson determined Jurries was not capable of performing his Manifest Pizza job. At the time of the original arbitration hearing Dr. Gordon found Jurries did not need any permanent restrictions for his low back. Dr. Mathew disagreed and recommended permanent restrictions that Deputy Elliott adopted. Tyson never followed any of the permanent restrictions adopted by Deputy Elliott when he issued the arbitration decision in May 2016. It was not until July 2017 that Dr. Gordon opined Jurries needed a permanent fifty pound lifting restriction for his low back, which disqualified Jurries from performing the Manifest Pizza job at Tyson. I find Jurries has established he sustained a change of physical condition, based upon Dr. Gordon's finding Jurries needed a permanent fifty pound lifting restriction that disqualified Jurries from the Manifest Pizza job.

Given Jurries has established a change of physical condition, it is necessary to determine whether the change in condition warrants an award of additional compensation benefits. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

Following the October 2015 hearing, Deputy Elliott found Jurries sustained a twenty-five percent industrial disability from his low back injury and a ten percent industrial disability from his neck injury. At the time of the November 2020 hearing, four years later, Jurries was fifty-four. (Tr., p. 15) Jurries graduated from alternative high school and has received no additional education. (2016 Arbitration Decision; Tr., p. 17)

Tyson avers Jurries' current lumbar spine complaints are due to a weed whacking incident in June 2018, at home, and not due to his work injury. Three physicians have provided opinions on causation and permanency in this case, Dr. Gordon, Dr. Abernathey, and Dr. Mathew. When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Dr. Gordon is an occupational medicine physician, who treated Jurries over time in the Tyson plant. In July 2018, Dr. Gordon opined within a reasonable degree of medical certainty that Jurries aggravated his lumbar spine while weed whacking at home and his low back complaints are not related to a work injury at Tyson. (Ex. F, p. 1) Dr. Gordon also opined in February 2020, that Jurries had no functional limitation in his cervical or lumbosacral spine with full range of motion in the cervical spine with no evidence of cervical radiculopathy and released him to full duty as a janitor without restrictions. (JE 1, pp. 20B) While he assigned a permanent lifting restriction of fifty pounds to Jurries, Dr. Gordon has never assigned Jurries a permanent impairment rating and his opinions do not reference the AMA Guides. When he assigned Jurries the fifty pound lifting restriction, Jurries was disqualified from the Manifest Pizza job. Just as Deputy Elliott found, I do not find Dr. Gordon's opinions persuasive.

Dr. Abernathey is a neurosurgeon with superior training, who treated Jurries over time, and performed surgery on his cervical spine. Dr. Abernathey assigned Jurries a nine percent permanent impairment rating for his cervical spine following surgery, he did not assign any permanent restrictions, and he recommended no additional treatment. (Exs. G, p. 1; 4, p. 34) Since the original arbitration hearing Dr. Abernathey has not provided an opinion on whether Jurries sustained a permanent impairment under the AMA Guides with respect to his mid or low back conditions. Tyson did not pose any questions to Dr. Abernathey on Jurries' thoracic and lumbosacral spine when it asked for his rating in June 2017. (Exs. G, pp. 1-2; 4, pp. 34-35)

Dr. Mathew is a physiatrist who has examined Jurries on several occasions and assigned Jurries a combined thirty-eight percent impairment using the AMA Guides. Dr. Mathew assigned Jurries a twenty-percent whole person impairment for his cervical spine fusion and cervical dystonia, a seven percent whole person impairment to the thoracic spine due to intractable and worsening pain, and twelve percent whole person impairment for his chronic low back pain and lumbosacral radiculopathy, which he attributed to the work injuries and not to the June 2018 weed whacking incident. Dr. Mathew recommended personal restrictions of avoiding lifting over fifteen pounds,

prolonged standing, walking, and sitting, avoiding squatting, ladders, and heights. (Ex. 2, p. 27) Dr. Mathew recommended follow-up care with a chronic pain specialist, physical therapy, aquatic therapy, and chronic pain management, including medical, psychology, and injection therapy. (Ex. 2, p. 27)

I find Dr. Mathew's opinion to be the most persuasive. As I discussed above, I found Jurries to be a credible witness. Jurries testified he aggravated his low back condition while weed whacking in June 2018 and that after a period of time he returned to his baseline. This is supported by the medical records in the case. I do not find the weed whacking incident is responsible for Jurries' current complaints.

Dr. Mathew recommended restrictions, as he did during the original proceeding. Tyson avers Jurries does not need any permanent restrictions relying on the opinions of Drs. Gordon and Abernathey. As noted above, Dr. Gordon recommended a fifty pound lifting restriction, which Tyson is following. Jurries credibly testified at hearing about his difficulties bending, twisting, and looking up while dusting and cleaning tables. As with Deputy Elliott, I adopt Dr. Mathew's restrictions as Jurries' permanent restrictions.

Jurries has worked for Tyson and its predecessor on and off for twenty-five years stacking boxes, moving meat combos, driving a mule, working in the freezer, conducting inventory, and working as a janitor. (Tr., p. 17; 2016 Arbitration Decision) Jurries has other past experience working as a car detailer, laborer chipping and hauling brush, and working for a flooring company. (2016 Arbitration Decision) Jurries' only employer since 2007 has been Tyson and its predecessor. Jurries has worked approximately six positions during his tenure with Tyson. (Tr., p. 17)

In July 2017, Dr. Gordon assigned Jurries a fifty pound lifting restriction, which disqualified him from performing the Manifest Pizza job he was performing at the time of the October 2015 hearing. In August 2017, Dr. Gordon opined Jurries was capable of performing the cold scale operator, remove tender membrane, and stomach separator positions. (JE 1, p. 10) Jurries could not perform the tender membrane job because he had previously undergone trigger finger release surgery. (Tr., p. 40) Jurries tried the cold scale job for two or three days. (Tr., p. 41) The job required Jurries to look up, which hurt his neck. (Tr., pp. 41, 65-66) Jurries relayed that he had an issue with looking up dating back to the 2015 hearing, which was one of the issues he had with the monitor tongues job. (Tr., p. 66) Tyson did not offer Jurries the separate stomachs job, which requires the employee to stand on a production line for three hours before taking a break. (Tr., pp. 41-42) Jurries reported he did not believe he could stand for three hours because of his low back condition, noting he can stand for approximately one hour at a time. (Tr., pp. 42-43)

On September 7, 2017, Tyson offered Jurries a position doing load-out product protection. (Tr., p. 45) The position required Jurries to drive and walk part of the time to check whether the reefer trailers had fuel and to check the temperature of the trailers outside the plant and to use a computer. (Tr., p. 45) Jurries testified he had a difficult

time concentrating and learning the new job. (Tr., p. 46) Tyson disqualified Jurries from the position on December 9, 2017. (Tr., p. 47) Jurries could physically perform the job, but he had difficulty learning the new job and struggled with the computer, which supports he would have a difficult time with retraining.

In February 2018, Jurries secured a full-time position as a maintenance janitor for Tyson and he continued to work in that position at the time of the November 2020 hearing. (Tr., pp. 47-48; Ex. 8, pp. 69-70) The position requires Jurries to clean the rest rooms, locker room, dust, and take out the trash, and the ability to lift forty pounds. (Tr., p. 48) Tyson allows Jurries to take a break to sit at least once per hour and he can move around the plant. (Tr., p. 43) Since the pandemic Jurries has to sanitize the tables in the cafeteria. (Tr., p. 49) Jurries reported the table are low, which aggravates his lower back and neck. (Tr., p. 49) A garbage sack may weigh fifty pounds or more. (Tr., p. 55) Tyson has informed Jurries that if the sack is too heavy he can take objects out or ask for help. (Tr., p. 55)

Jurries has worked for Tyson and its predecessor on and off many years. Since the original arbitration hearing, Dr. Gordon imposed a fifty pound permanent lifting restriction on Jurries, which disqualified him from the Manifest Pizza job. Dr. Gordon opined Jurries could perform five additional jobs within his restrictions. As noted above, Jurries was able to perform one of the positions, the janitor position he is currently performing. There was no evidence presented at hearing that Jurries' job is in jeopardy.

Considering the difficulty finding a position in the plant within Jurries' functional limitations and residual capacities, I believe if Jurries were to lose his job at Tyson he would likely have difficulty with retraining and securing employment consistent with his past-relevant work, functional limitations, and residual capacities. Based on the factors of industrial disability, I find Jurries' has sustained an additional thirty-five percent industrial disability. I find Jurries is entitled to an additional fifteen percent industrial disability with respect to his low back, File Number 5048758, for an additional seventy-five weeks of weekly benefits at the stipulated rate of \$395.72, and an additional twenty percent industrial disability with respect to his cervical spine, File Numbers 5048759 and 5067793, for an additional 100 weeks of weekly benefits at the stipulated rate of \$389.25, commencing on March 4, 2019, the date the review-reopening actions were filed. These findings are based on the fact that Jurries remains employed by Tyson.

II. COSTS

Jurries seeks to recover \$300.00 for the filing fees, \$154.60 for Jurries' deposition, \$263.77 for postage paid in sending process, depositions, and other papers, \$303.88 for medical records, and \$200.00 for a phone conference with Dr. Abernathey, set forth in Exhibit 9.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers'

compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The administrative rule expressly allows for the recovery of \$300.00 in filing fees, the \$154.60 cost of Jurries' deposition, and for the cost of service of the original notice and subpoenas.

Jurries did not itemize the cost of service of the original notice or any subpoenas for this case. Instead, Jurries relies on Iowa Code section 625.7, which governs postage for civil and criminal proceedings. Iowa Code section 625.7 does not apply to workers' compensation proceedings. The administrative rules have adopted portions of the Iowa Code involving civil actions, including portions of Iowa Code chapter 622, set forth above. Jurries is not entitled to recover \$263.77 for postage paid in sending process, depositions, and other papers, given his failure to itemize what was paid for service of process of the original notice and subpoenas.

The administrative rule does not allow for the recovery of the cost of medical records or for the cost of a telephone call or conference with a physician. 876 IAC 4.33(6). The rule allows for the recovery of a report prepared by the physician, the cost of deposition testimony, and the cost and expenses of witness testimony. *Id.* Jurries is not entitled to recover the \$303.88 cost for medical records, or the \$200.00 cost of the phone conference with Dr. Abernathey.

ORDER

IT IS THEREFORE ORDERED, THAT:

For File Number 5048758, Defendant shall pay Claimant an additional seventy-five weeks of permanent partial disability benefits at the stipulated rate of three hundred ninety-five and 72/100 dollars (\$395.72), commencing on March 4, 2019.

For File Numbers 5048759 and 5067793, Defendant shall pay Claimant an additional 100 weeks of permanent partial disability benefits at the stipulated rate of three hundred eighty-nine and 25/100 dollars (\$389.25), commencing on March 4, 2019.

Defendant is entitled to a credit for all benefits paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Sanchez v. Tyson, File No.

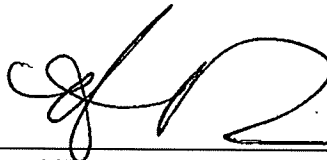
5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendant shall reimburse the claimant one thousand one hundred sixty-five and 88/100 dollars (\$1,165.88) for the cost of Dr. Mathew's independent medical examination, as stipulated at hearing.

Defendant shall reimburse the claimant three hundred and 00/100 dollars (\$300.00) for the filing fees, and one hundred fifty-four and 60/100 dollars (\$154.60) for Jurries' deposition.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 3rd day of May, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

Dillon Besser (via WCES)

Jason Wiltfang (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.